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No. _____

In The
Supreme Court of the United States
October Term, 1998

FRANK STAVROFF,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI
with Appendix

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QUESTIONS PRESENTED FOR REVIEW

(1) Whether a violation of the Right of Confrontation can be deemed harmless beyond a reasonable doubt, where the star government witness' cross-examination on the issue of his plea agreement and corresponding expectation of leniency was prohibited.

(2) Whether a trial court may prohibit defense cross-examination of a cooperating government informant concerning his expectations attendant to a plea agreement simply because the prosecutor offered the plea agreement and questioned the informant on direct examination regarding the obligation to testify truthfully.

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STATEMENT OF JURISDICTION

Petitioner seeks review of the Sixth Circuit Court of Appeals decisions first affirming his criminal convictions on July 20, 1998, and later denying rehearing and *en banc* rehearing on September 1, 1998. The United States District Court for the Southern District of Ohio, Eastern Division, maintained original jurisdiction over Petitioner's case by virtue of the federal criminal charges of conspiracy to commit tax fraud in violation of 18 U.S.C. § 371 and filing false individual tax returns in violation of 26 U.S.C. § 7206(1). Petitioner now seeks review in this Court pursuant to Rule 10, et seq., of the Rules of the Supreme Court of the United States, and 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS & STATUTES INVOLVED

Confrontation Clause, U.S. CONST. amend. VI

18 U.S.C. § 371

26 U.S.C. § 7206(1)

Advisory Committee Notes, FED. R. EVID 608

FED. R. EVID 608

STATEMENT OF THE CASE & FACTS

Frank Stavroff (hereinafter "Petitioner") was convicted in the United States District Court for the Southern District of Ohio, Eastern Division, of one count of conspiracy to defraud the United States in violation of 18 U.S.C. § 371, and three counts of subscribing a false tax return in violation of 26 U.S.C. § 7206(1). These charges related to Petitioner's ownership interests in two local businesses. The Indictment alleged that Appellant had conspired with the other owners to "skim" money from the businesses and thereby avoid tax liability.

Although numerous witnesses testified regarding the general contents of allegedly fraudulent tax returns, only one witness, Steven Dosky, testified that Petitioner was responsible for fraudulent acts. Dosky, Petitioner's former associate, was a cooperating government witness testifying pursuant to a plea agreement. He explained how the businesses generated false financial statements and filed fraudulent tax returns. Dosky further testified that Petitioner was directly involved in the tax fraud. Unquestionably, Dosky was the most important government witness. Aside from his testimony, there was no direct evidence to link Petitioner to any criminal activity.

Moreover, he provided the only evidence that established the mental elements of the charged offenses.[1]

During direct examination, the prosecutor introduced Dosky's plea agreement. Prior to any impeachment efforts by defense counsel, the prosecutor elicited testimony stressing that Dosky was obligated to testify truthfully pursuant to the agreement. This extrinsic evidence served no purpose other than to accredit Dosky's character trait of truthfulness.

On cross-examination, defense counsel sought to impeach Dosky's credibility by questioning him regarding his expectations of leniency attendant to the plea agreement.

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[1]In its Opinion, the Sixth Circuit panel incorrectly concluded that "while essential to the conspiracy charge, [Dosky] was not necessary for the underreported income charges." *United States v. Stavroff*, 149 F.3d 478, 483, n.2 (6th Cir. 1998). On the contrary, Dosky's testimony was essential to all counts in the Indictment, not merely the conspiracy charge. In order to convict Petitioner on all counts, the government was required to prove beyond a reasonable doubt that he acted willfully and knowingly. Only Dosky offered testimony regarding these elements, along with all other essential elements of the charged offenses. Although Dosky testified regarding the conspiracy count, the essential elements of the remaining charges could not be established in the absence of proof of a conspiracy. Therefore, the charges were inextricably linked, and Dosky's testimony was essential to prove the underreported income charges as well as the conspiracy charge.

The court *sua sponte* interrupted the cross-examination and prohibited any inquiry regarding Dosky's motive to testify and the favorable treatment that he hoped to receive in exchange for his cooperation. The court then proclaimed in the presence of the jury that Dosky's "hopes [for lenient treatment have] nothing to do with the guilt or innocence of this defendant."

The following excerpts from the trial court record illustrate defense counsel's futile attempts to cross-examine Dosky and the trial court's improper commentary before the jury:

> MR. BINNING: Mr. Dosky, by a bill of information you pled guilty to one count of conspiracy in the United States District Court, is that correct?
>
> DOSKY: That is correct.
>
> MR. BINNING: And one of the hopes in your entering-
>
> COURT: One of the what? What did you say, one of the what?
>
> MR. BINNING: Through the means of a bill of information, your Honor, you entered a plea of guilty to one count of conspiracy.

COURT: What was your next question to this witness?

MR. BINNING: After that question, your Honor?

COURT: Yes. One of your hopes, is that what you said?

MR. BINNING: No, Sir. I hadn't gotten to that question yet.

COURT: Go ahead.

MR. BINNING: Thank you, your Honor.

MR. BINNING: By entering the plea, you hoped to lessen any personal exposure --

COURT: Do you object to that question?

MR. BROWN: No, I can't, your Honor. I can't object to that question.

COURT: You what?

MR. BROWN: I'm sorry. I cannot object to that question. I apologize.

COURT: Go ahead.

MR. BINNING: Thank you, your Honor. By entering a plea of guilty to the conspiracy count, it was your intention to lessen your exposure regarding any penalty that might be imposed on you, correct?

COURT: Regarding the what?

MR. BINNING: Regarding any penalty that might be imposed upon you.

COURT: I won't let you answer that question. Go ahead. His hopes has nothing to do with the guilt or innocence of this defendant. Now go ahead.

MR. BINNING: May I approach the bench, your Honor?

COURT: No, you may not.

MR. BINNING: Why did you enter a plea to one count of conspiracy?

COURT: What?

MR. BINNING: Your Honor, I will strike that. May I approach the bench?

COURT: No, you may not.

MR. BINNING: May I proffer something on the record?

COURT: You may at recess. Whatever you want to do.

(Emphasis added).

On October 11, 1998, the jury returned verdicts of guilty on all charges. Petitioner filed a timely Notice of Appeal from the final sentence on February 10, 1997. On June 3, 1997, The Sixth Circuit Court of Appeals ordered Petitioner's release on bail pending appeal. Petitioner later filed his appellate brief in the Sixth Circuit on September 3, 1997, raising the following relevant Assignments of Error:

I. The District Court erred in prohibiting cross-examination of a crucial prosecution

witness regarding expectations of leniency pursuant to a plea agreement, thereby depriving defendant of the Right of Confrontation in violation of the Sixth Amendment to the United States Constitution.

II. The District Court erred when it interrupted the cross-examination of a crucial prosecution witness and stated in the presence of the jury that the witness's "hopes" for leniency in exchange for testimony had nothing to do with the guilt or innocence of the accused, thereby depriving defendant of the right to a fair and impartial trial in violation of the Sixth Amendment to the United States Constitution.

On July 20, 1998, the Sixth Circuit affirmed Petitioner's convictions, issuing an opinion later submitted for full text publication. *United States v. Stavroff*, 149 F.3d 478 (6th Cir. 1998). On August 3, 1998, Petitioner filed a Petition for Rehearing and Suggestion for Rehearing *En Banc*, raising the following issues:

(1) Whether the Right of Confrontation, once violated, can be deemed harmless beyond a reasonable doubt, where, as here, the star

government witness' cross-examination on the issue of his plea agreement and corresponding expectation of leniency was prohibited.

(2) Whether a prosecutor's direct examination of its star witness regarding his obligation to testify truthfully pursuant to a plea agreement can provide a constitutionally sufficient substitute for the right of cross-examination and enable jurors to meaningfully evaluate credibility.

In an Order dated September 1, 1998, the Sixth Circuit declined to rehear the case *en banc* and referred the case to the original panel members, who likewise declined to rehear the case. Petitioner now seeks a Writ of Certiorari in this Court for review of the Sixth Amendment issues raised in the trial court and in the Sixth Circuit.

ARGUMENT

In direct violation of the Confrontation Clause and this Court's well-established precedent, the Sixth Circuit has fabricated a rule of law that prohibits a criminal defendant from cross-examining a cooperating government informant regarding his or her hopes and expectations of lenient

treatment from the prosecutor. Accordingly, Supreme Court review is essential to eliminate the unconstitutional Sixth Circuit precedent and preserve the integrity of the Sixth Amendment Right of Confrontation.

I. SIXTH CIRCUIT REASONING

As the Sixth Circuit recognized, the trial court unequivocally violated Petitioner's Right of Confrontation. However, the Sixth Circuit declined to reverse, concluding that the error was harmless beyond a reasonable doubt. *Stavroff*, 149 F.3d at 478-483.

In support of its conclusion, the Sixth Circuit ostensibly relied upon the harmless error analysis provided by this Court in *Delaware v. Van Arsdall*, 475 U.S. 673 (1986). While the court's opinion correctly enumerated the five-part harmless error test set forth in *Van Arsdall*,[2] its

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[2]In *Van Arsdall*, this Court set forth the following five-factor test to determine whether a Sixth Amendment violation is harmless beyond a reasonable doubt:

> The correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt. Whether such an error is harmless in a particular case depends upon a host of factors, all readily accessible to reviewing courts. These factors include the importance

decision ultimately turned upon an unconstitutional expansion of the harmless error doctrine far beyond the contemplation of *Van Arsdall*.

> The factors listed in *Van Arsdall* were not exclusive. Rather, the Court recognized that a harmless-error analysis 'in a particular case depends upon ***a host of factors***, all readily accessible to reviewing courts.' 475 U.S. at 684. Therefore, we conclude that the presence of facts in the record sufficient to permit a reasonable juror to infer bias on the part of Dosky rendered any error by the district court in limiting impeachment for bias harmless beyond a reasonable doubt.

Stavroff, 149 F.3d at 483 (emphasis added).

Relying on the "host of factors" language in *Van Arsdall*, the Sixth Circuit reasoned that because the plea agreement, along with the government's direct examination of Dosky, provided information regarding the terms of his

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> of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and of course, the overall strength of the prosecution's case.

Van Arsdall, 475 U.S. at 684.

cooperation and his promise to testify truthfully, the prohibition of cross-examination on issues of bias and expectations of leniency was harmless beyond a reasonable doubt.[3] The Sixth Circuit thus created a standard that allows a trial court to preclude cross-examination and permit as a substitute self-accrediting evidence adduced by the government in its case-in-chief.[4]

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[3]Ironically, the direct examination only served to accredit, not impeach, Dosky. Moreover, the written agreement merely reiterated in writing that Dosky would testify truthfully. In the absence of any cross-examination on the circumstances underlying the plea negotiations and Dosky's expectations of leniency, the jury could conclude only that Dosky must be testifying truthfully.

[4]The information elicited by the government from Dosky in Petitioner's case did not cover the proposed area of cross-examination. The proposed cross-examination related to the witness' bias and expectations of leniency associated with his plea agreement. The witness' direct testimony simply stated that he had agreed to testify truthfully pursuant to the terms and conditions of the plea agreement. This testimony served no purpose other than to accredit the government's Dosky's character for truthfulness. Neither the direct examination nor the signed plea agreement referenced the witness' potential bias and expectations of leniency. Thus, even if the Sixth Circuit relied upon an appropriate standard, its reasoning is inherently and unconstitutionally flawed, as the government's direct examination was not a valid factual substitute for the proposed cross-examination.

The Sixth Circuit's decision misstates and unconstitutionally expands the appropriate harmless error standard in violation of the Sixth Amendment Right of Confrontation and well-established Supreme Court authority.

II. Basis for Writ of Certiorari

Rule 10 of the Rules of the Supreme Court of the United States sets forth a non-exhaustive list of the circumstances wherein the Court may grant the discretionary Writ of Certiorari. Two of these circumstances are present in the instant case. First, as contemplated by Rule 10(c), the Sixth Circuit, in consideration of the natural, logical extension of its reasoning, "has decided an important question of federal law that has not been, but should be, settled by this Court." In so doing, it "has decided an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c). Second, as contemplated by Rule 10(a), the Sixth Circuit's novel and erroneous reasoning "has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by the lower court, as to call for an exercise of this Court's supervisory power . . . ." Sup. Ct. R. 10(a).

A. Unsettled Law & Conflicting Authority

1. Unsettled Law

The Sixth Circuit purported to rely upon this Court's decision in *Van Arsdall*. However, the Sixth Circuit based its decision not upon the well-established five factors set forth in *Van Arsdall*, but upon the general "host of factors" language contained in the *Van Arsdall* opinion.

Each element of the five-factor test set forth in *Van Arsdall* is clearly defined and provides a concrete basis for analyzing a particular violation of the Sixth Amendment. However, the "host of factors" language, which appears to permit courts to consider factors not specifically enumerated, is far less specific. Therefore, clarification of this language is necessary to prevent an unconstitutional expansion of the harmless error doctrine.

Petitioner's case exemplifies the need to clarify and further refine the extent of discretion vested by the "host of factors" language. Relying on a vastly overbroad expansion of this terminology, the Sixth Circuit extended the harmless error standard far beyond the original intent suggested by this Court in *Van Arsdall*. In essence, the Sixth Circuit has sanctioned a new rule of trial procedure that eliminates defense cross-examination by rendering virtually all Sixth Amendment violations harmless.

The focus of the *Van Arsdall* five-factor test was whether, despite the Sixth Amendment violation, the accused was otherwise able to attack the witness' credibility

effectively and completely.[5] In contrast, the Sixth Circuit based its decision in Petitioner's case upon the direct examination by the prosecution, not the cross-examination by the accused. Under this expansive Sixth Circuit standard, the prosecution may prevent damaging cross-examination of its witnesses by eliciting direct testimony, under non-adversarial conditions, on topics that would otherwise be the subject of cross-examination. In reaching its conclusion, the Sixth Circuit cited no authority and provided no meaningful factual or legal analysis to support its decision.

Petitioner recognizes that the Writ of Certiorari "is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." SUP. CT. R. 10. However, the error in Petitioner's case involves far more than a misapplication of the proper law. The Sixth Circuit has enunciated a novel

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[5]Thus, harmless error often arises where the prohibited cross-examination was redundant with former or later cross-examination. Therefore, in these types of situations, a technical confrontation violation is rendered harmless, as the accused has been provided an opportunity to explore otherwise the prohibited cross-examination. *See, e.g., Carrillo v. Perkins*, 723 F.2d 1165 (5th Cir. 1984); and *United States v. Garza*, 754 F.2d 1202 (5th Cir. 1985). Contrary to this typical situation, Petitioner had no opportunity to cross-examine Dosky, the essential government informant.

standard of law based upon an unconstitutional expansion of the harmless error doctrine established in *Van Arsdall*. If permitted to remain intact, the unprecedented expansion of law will effectively eliminate the fundamental Right of Confrontation by rendering all violations harmless. Accordingly, it is essential for this Court to eliminate the Sixth Circuit's unconstitutional expansion of *Van Arsdall* and thereby preserve the fundamental Right of Confrontation.

2. Inconsistent Authority

The Sixth Circuit decision conflicts with well-established Supreme Court authority. In *Davis v. Alaska*, 415 U.S. 308 (1974), this Court found reversible error where a criminal defendant was prohibited from cross-examining a key government witness on issues of bias, motive, or other reasons to fabricate testimony. Although the proposed cross-examination in Petitioner's case was virtually identical to that in *Davis*, the Sixth Circuit determined that the Sixth Amendment violation was harmless error, thereby ignoring controlling Supreme Court precedent.

In *Davis*, the defendant was accused of stealing a safe from a bar. During trial, the government presented evidence that the police had found paint chips on the safe that matched the paint on the defendant's car. The government also offered testimony from a witness who had

seen the defendant holding a crowbar near the location where the safe was recovered. Defense counsel sought to cross-examine this witness regarding his juvenile probationary status relating to a prior theft conviction, which had a direct bearing on credibility. The trial court prohibited cross-examination in this area, and the defendant was convicted.

On review, this Court reversed the conviction, holding that the trial court violated the Sixth Amendment. In so holding, this Court stated the following:

> [D]efense counsel should have been permitted to expose to the jury the facts from which jurors, as the sole trier of fact and credibility, could appropriately draw inferences relating to the reliability of the witness . . . ***[and] den[ial] [of] the right of effective cross-examination which would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it.***

Id. at 318 (quoting *Smith v. Illinois,* 390 U.S. 129, 131 (1968)) (emphasis added).

In so holding, this Court determined that the trial court's limitation on defendant's right to cross-examine the prosecution's star witness was not harmless error. *Id.* at 314 (citing *Douglas v. Alabama,* 380 U.S. 415, 418 (1965)). The Court reached this conclusion despite the fact that the

paint chips on the safe provided additional direct evidence linking the defendant to the criminal activity.

Petitioner's case is factually similar to *Davis*. In both, the trial court prohibited cross-examination of a government witness on matters affecting credibility, resulting in a violation of the Sixth Amendment. However, the Sixth Amendment violation in *Davis*, where this Court refused to find harmless error, was far less egregious than the violation in Petitioner's case. Unlike the situation in *Davis*, the witness in Petitioner's case presented the only direct testimony linking Petitioner to the crimes charged and the sole evidence establishing the required mental elements. In contrast, the paint chips in *Davis* directly implicated the defendant to the criminal activity, irrespective of the witness' testimony. As a result, Dosky's testimony in Petitioner's case was significantly more important to the government's case than that of the witness in *Davis*. Nevertheless, in direct contravention of this Court's holding in *Davis*, the Sixth Circuit determined that the error was

harmless beyond a reasonable doubt.[6] The Sixth Circuit decision ignores this Court's controlling decision in *Davis*.

Accordingly, the decision in Petitioner's case is contrary to controlling precedent set forth by this Court, as contemplated by Rule 10(c). Review by this Court is necessary to reaffirm the well-established authority set forth in *Davis*, eliminate the Sixth Circuit's unconstitutional precedent, and preserve the fundamental protections afforded by the Sixth Amendment Right of Confrontation.

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[6]Petitioner recognizes that *Davis* was decided well before *Van Arsdall*. Nevertheless, there is no valid argument that merely because the Sixth Circuit relied upon the later Supreme Court decision in *Van Arsdall* for its harmless error analysis, the holding in *Davis* is not controlling. The *Van Arsdall* test was clearly intended to clarify the harmless error doctrine and provide lower courts with further guidance in analyzing a particular Sixth Amendment violation. However, *Van Arsdall* certainly was not intended to overrule the landmark decision in *Davis*; thus, *Davis* remains as controlling authority for similar fact patterns. This Court in *Davis* would have reached the same conclusion if the case were decided today, in consideration of the later pronounced standards in *Van Arsdall*. Accordingly, where, as here, a lower court purportedly relies upon *Van Arsdall* to reach a conclusion opposite to that dictated by *Davis*, the court has in effect decided a case in direct contravention of controlling authority of this Court.

B. Departure from Accepted and Usual Course of Judicial Proceedings

The Sixth Circuit has contrived a standard that allows a trial court to eliminate a criminal defendant's Right of Confrontation and permit as a substitute evidence adduced by the prosecutor during direct examination accrediting the veracity of its own witness. This standard is such a departure from the accepted and usual course of judicial proceedings that it is necessary for this Court to exercise its supervisory power in order to preserve the integrity of the fundamental Right of Confrontation.

This Court has recognized the fundamental importance of the Right of Confrontation in our system of justice, characterizing adversarial cross-examination "as the greatest legal engine ever invented for the discovery of truth." *California v. Green*, 399 U.S. 149, 158 (1970). The Sixth Amendment guarantees adversarial confrontation of one's accusers:

> The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact. ***The word confront, after all, also means a clashing of forces or***

> ***ideas, thus carrying with it the notion of adversariness.***

Maryland v. Craig, 497 U.S. 836, 846 (1990) (emphasis added).

This Court has also recognized the societal interest in the preservation of the adversarial nature of the Right of Confrontation:

> On one level, the right to confront and cross-examine adverse witnesses contributes to the establishment of a system of criminal justice in which the perception as well as the reality of fairness prevails. To foster such a system, ***the Constitution provides certain safeguards to promote to the greatest possible degree society's interest in having the accused and the accuser engage in an open and even contest in public trial.***

Lee v. Illinois, 476 U.S. 530, 540 (1986) (emphasis added).

In direct contravention of these fundamental principles, the Sixth Circuit decision establishes an unconscionable precedent that allows a trial court to deprive a defendant of the right to cross-examine a cooperating government informant and permit as a substitute self-promoting, accrediting evidence adduced by the government. When taken to its logical conclusion, the Sixth Circuit holding allows a trial court to prohibit cross-examination on the essential issue of credibility if the

government previously covered the topic on direct examination. Prosecuting attorneys are now encouraged to avoid damaging and constitutionally required cross-examination of cooperating witnesses simply by exploring vulnerable topics during their direct examination.

Sixth Circuit standard represents a clear departure from fundamental Sixth Amendment jurisprudence. It is axiomatic that the Sixth Amendment contemplates more than a physical confrontation: "The main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination." *Davis*, 415 U.S. 308, 315-16; *Coy v. Iowa*, 487 U.S. 1012, 1019 (1988). Moreover, "the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of confrontation." *Id.* at 316-17 (citing *Greene v. McElroy*, 360 U.S. 474, 496 (1959)). The Sixth Circuit precedent vitiates these fundamental principles of confrontation.

Petitioner's case exemplifies the inherent unconstitutional ramifications of the Sixth Circuit decision. In a clear and undisputed violation of the Sixth Amendment, trial counsel was prohibited from cross-examining Dosky, the most important government witness, regarding the benefits he expected to receive from the

government in exchange for his testimony.[7] Despite the egregious nature of the Sixth Amendment violation, the Sixth Circuit held that the trial court's error was harmless beyond a reasonable doubt. As indicated above, the panel reasoned that the plea agreement, which was submitted into evidence by the government, along with the direct testimony of Dosky, presented a sufficient factual basis "to permit a reasonable juror to infer bias on the part of Dosky . . . ." *Stavroff*, 149 F.3d at 483. The decision, which was recommended for full text publication, is devoid of any Supreme Court or other circuit court authority to support its barren conclusion that the Sixth Amendment can be adequately protected by the prosecutor's direct examination of its own cooperating witness.

The danger of the Sixth Circuit's novel precedent is apparent. The information contained in the plea agreement as elicited during Dosky's direct examination made no reference to his expectations of leniency, the extent of the favorable treatment he would receive, or the facts and

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[7]The Sixth Amendment violation was compounded by the trial court's improper statement in the presence of the jury that Dosky's "hopes [have] nothing to do with the guilt or innocence of this defendant." The Sixth Circuit acknowledged the impropriety of the trial court's conduct, yet concluded that the trial court "in no way gave any indication as to his opinion of Dosky's credibility." *Stavroff*, 149 F.3d at 483.

circumstances underlying the plea negotiations. These areas represented the essence of Petitioner's intended but prohibited cross-examination. The self-serving evidence presented by the government through direct examination established only that Dosky had agreed to testify truthfully. Naturally, as this information was presented during the government's case-in-chief, it is was wholly supportive of Dosky's credibility, which was indispensable to the government's case. Neither the government's direct examination nor terms and conditions of the plea agreement had any impeachment value whatsoever.[8]

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[8]On the contrary, the prosecutor's direct examination merely served to accredit its star witness by placing the government's authority behind the assurance that the witness would testify truthfully. In reality, the government improperly offered character evidence supporting its witness' truthfulness, in direct contravention to FED. R. EVID 608(a), which provides that "evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked . . . ." Ironically, the crux of the Sixth Circuit's reasoning, which finds harmless error based upon the prosecutor's direct examination on the subject of truthfulness, relies upon a clear violation of Rule 608 and the well-established principle common law principle that "[c]haracter evidence is in support of credibility is admissible . . . only after the witness' character has first been attacked." Advisory Committee Notes, FED. R. EVID 608(a).

As a result, the jury was deprived of any information regarding Dosky's expectations of leniency and the circumstances underlying his plea agreement. The jury had no opportunity to evaluate Dosky's demeanor while testifying under rigorous cross-examination on these issues. The trial court's prohibition, as sanctioned by the Sixth Circuit, destroyed "the greatest legal engine ever invented for the discovery of truth." *California v. Green*, 399 U.S. at 158. There was no "clashing of forces or ideas," as contemplated by the ordinary and usual course of the trial process in our justice system. *Craig*, 497 U.S. at 846. Dosky's credibility, the key factor in the government's case, was never tested through cross-examination, and Petitioner was convicted.

In sum, the Sixth Circuit decision emasculates the integrity of the Sixth Amendment and adversarial process by creating an unprecedented rule of law that permits a trial court to eliminate cross-examination by defense counsel on areas crucial to credibility. This precedent undermines fundamental Sixth Amendment jurisprudence by eliminating the most effective element of the Right of Confrontation: adversarial cross-examination. The Sixth Circuit's proposed substitute--direct examination by the government--cannot constitutionally replace cross-examination. Accordingly, the Sixth Circuit as so far departed from the accepted and usual course of judicial proceedings that it is now necessary for this Court to exercise its supervisory power in order to

preserve the integrity of the fundamental Right of Confrontation as guaranteed by the Sixth Amendment.

CONCLUSION

The Sixth Circuit extended the harmless error analysis to such an extreme that the Sixth Amendment Right of Confrontation has been rendered meaningless. This case presents an opportunity to reaffirm the fundamental importance of adversarial cross-examination and eliminate the unprecedented rule of law created by the Sixth Circuit. Accordingly, for the aforementioned reasons, Petitioner respectfully requests this Court to grant the Writ of Certiorari.

Respectfully submitted,

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SIXTH CIRCUIT OPINIONS & ORDERS:

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER DENYING PETITION
FOR REHEARING *EN BANC*

Sixth Circuit Case №. 98-3126
Filed September 1, 1998

Pages A-1 thru A-1

98-3126

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

6th Circuit
Court of Appeals
Filed 9/1/98

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

FRANK STAVROFF,
Defendant-Appellant.

ORDER

BEFORE: KENNEDY, GUY, and NORRIS, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green

Leonard Green, Clerk

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

OPINION

Sixth Circuit Case №. 98-3126

Pages A-2 thru A-21

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

Electronic Citation: 1998 FED App. 0216P (6th Cir.)
File Name: 98a0216p.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*	)	
v.	)	No. 97-3126
FRANK STAVROFF, *Defendant-Appellant.*	)	

Appeal from the United States District Court
for the Southern District of Ohio at Columbus.
No. 96-00097--Joseph P. Kinneary, District Judge.

Argued: June 15, 1998

Decided and Filed: July 20, 1998

Before: KENNEDY, GUY, and NORRIS, Circuit Judges.

COUNSEL

ARGUED: R. William Meeks, Columbus, Ohio, for Appellant. Daniel Allen Brown, OFFICE OF THE U.S. ATTORNEY, Columbus, Ohio, for Appellee. **ON BRIEF:**

R. William Meeks, John Boyd Binning, Columbus, Ohio, for Appellant. Daniel A. Brown, OFFICE OF THE U.S. ATTORNEY, Columbus, Ohio, for Appellee.

OPINION

RALPH B. GUY, JR., Circuit Judge. Defendant appeals his convictions for conspiracy to commit tax fraud in violation of 18 U.S.C. § 371 and for filing false individual tax returns in violation of 26 U.S.C. § 7206(1). He contends that the district court (1) deprived him of his right to confront witnesses by limiting cross-examination of a government witness regarding that witness' motivation in testifying; (2) deprived him of his right to an impartial jury by commenting that the witness' motivation had no relation to defendant's guilt or innocence; and (3) erred in admitting certain documents under the hearsay exception for business records. Based upon our review of the record, we conclude that the court erred in limiting cross-examination in the manner it did, but that the error was harmless. Accordingly, we affirm.

I.

Defendant, Frank Stavroff, was indicted along with two co-defendants, Franz J. Schwarzbach and Robert T. Hetzel, in a ten-count indictment alleging conspiracy to commit tax fraud and underreporting of income. His co-defendants pleaded guilty to the conspiracy charge and Stavroff was tried before a jury. He was convicted on all relevant charges. One of his co-conspirators, Steven Dosky,

who was separately indicted and pleaded guilty to conspiracy, testified on behalf of the government. At trial, evidence was presented that showed that Stavroff, Schwarzbach, Hetzel, and Dosky, were owners of a Columbus, Ohio, nightclub called "Spinners." From 1991 through 1993, these men methodically skimmed the profits of the club to underreport income. The company formed to own Spinners, 2171, Inc., was a closely-held corporation and profits were directly taxable to the shareholders based on their percentage of ownership. Stavroff owned 20 percent, Dosky owned 13-1/3 percent, and Schwarzbach and Hetzel each owned 33-1/3 percent. The shareholders divided the actual cash profits on a weekly basis but reported a lesser figure to their bookkeepers for tax purposes. The company also failed to report accurately to its bookkeepers the number of its employees and their wages.

The record also showed that Stavroff was one of three equal owners of SES Liquor Company (SES), along with Schwarzbach and another individual, who was unrelated to 2171, Inc. SES operated a nightclub known as the "Gables Lounge." Although not charged as a separate offense under the indictment, the evidence showed that the SES profits were skimmed in the same manner as those of 2171, Inc. This information was withheld from SES's bookkeeper. SES also underreported the size of its staff.

Following his conviction, Stavroff was sentenced to 16 months imprisonment, assessed a $10,000 fine, and was ordered to serve two years of supervised release. This appeal followed.

II.

A. Limited Cross-Examination

Stavroff first challenges the district court's limiting of his cross-examination of co-conspirator, Steven Dosky, who testified for the prosecution. At the end of defense counsel's cross-examination of Dosky, counsel raised the issue of Dosky's plea agreement under which Dosky agreed to testify for the government. At the time of trial, Dosky had not yet been sentenced. The exchange proceeded as follows:

> Q Mr. Dosky, by a bill of information you pled guilty to one count of conspiracy in the United States Federal District Court; is that correct?
>
> A That is correct.
>
> Q And one of the hopes in your entering --
>
> THE COURT: One of the what? What did you say, one of the what?
>
> MR. BINNING: Through the means of a bill of information, your Honor, you entered a plea of guilty to one count of conspiracy.

THE COURT: What was your next question to this witness?

MR. BINNING: After that question, your Honor?

THE COURT: Yes. One of your hopes, is that what you said?

MR. BINNING: No, sir. I hadn't gotten to that question yet.

THE COURT: Go ahead.

MR. BINNING: Thank you, your honor.

Q By entering the plea, you hoped to lessen any personal exposure --

THE COURT: Do you object to that question?

MR. BROWN [the prosecuting attorney]: No, I can't, your Honor. I can't object to that question.

THE COURT: You what?

MR. BROWN: I'm sorry, I cannot object to that question. I apologize.

THE COURT: Go ahead. Go ahead.

MR. BINNING: Thank you, your honor.

Q By entering the plea of guilty to the conspiracy count, it was your intention to

lessen your exposure regarding any penalty that might be imposed upon you; correct?

THE COURT: Regarding the what?

MR. BINNING: Regarding any penalty that might be imposed upon you.

THE COURT: I won't let you answer that question. Strike that question. Go ahead. His hopes has nothing to do with the guilt or innocence of this defendant. Now go ahead.

MR. BINNING: May I approach the bench, your Honor?

THE COURT: No, you may not.

Q Why did you enter a plea to one count of conspiracy?

THE COURT: What?

MR. BINNING: Your Honor, I will strike that. May I approach the bench?

THE COURT: No, you may not.

MR. BINNING: May I proffer something on the record?

THE COURT: You may at recess. Whatever you want to do.

MR. BINNING: Thank you, sir.

THE COURT: Are you through with this witness?

MR. BINNING: Yes, your Honor, I have completed my examination.

Later, Stavroff made a proffer related to the excluded cross-examination:

> THEREUPON, OUT OF THE HEARING AND PRESENCE OF THE COURT AND JURY, THE FOLLOWING PROFFER WAS MADE:[1]
>
> MR. BINNING: If the Court please, I object to the restriction of the defendant's right to full and fair and complete cross-examination of the witness Steven Dosky in the areas of truthfulness, credibility and also motivation in entering a plea before the Honorable Judge Graham in the United States District Court.
>
> Additionally, in relation to the proffer, if I would have been permitted to continue with the line of questions, I believe that it very definitely had a bearing on this witness' credibility in relation to his accusations regarding my client.
>
> Thank you.

---

[1]We express our strong disapproval of proffers being made when the trial judge is not present.

> MR. BROWN: If he would have been permitted to ask questions in those areas, I had rehabilitation kinds of evidence I think available, mostly testimony that now I am unable to use. So I mean I am not agreeing with him; it's just that I don't think that would have been all one-sided.

The Confrontation Clause of the Sixth Amendment guarantees an accused "the right . . . to be confronted with the witnesses against him." The Supreme Court has recognized "'that the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination.'" *Delaware v. Van Arsdall*, 475 U.S. 673, 678-79 (1986) (quoting *Davis v. Alaska*, 415 U.S. 308, 316-17 (1974)). A criminal defendant states a violation of that right "by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby 'to expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness.'" *Van Arsdall*, 475 U.S. at 680 (quoting *Davis*, 415 U.S. at 318)).

The denial of a defendant's opportunity to impeach a witness for bias, however, is subject to a "harmless-error analysis." 475 U.S. at 684. According to the Court:

> The correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt. Whether such an error is harmless in a particular case depends upon a host of factors, all readily accessible to reviewing courts. These factors include the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case.

Id.

In this case, Stavroff contends the district court improperly prohibited him from attempting to impeach Dosky for bias. We agree.

We first express our disapproval of the court, *sua sponte*, barring the question at issue after the government had refused to object to the question. We see any number of problems with the way in which the court proceeded. Although the trial judge does not have to be a passive bystander, the court should avoid interjecting itself

unnecessarily into the questioning of an important witness, particularly in a criminal case. It is not the job of the trial judge to try the case for the government. Here, for example, the government found the question unobjectionable. However, even if the question had been clearly objectionable, the government may have elected for strategic reasons not to object. The trial judge should not assume that every failure to object is the result of a failure to recognize the possible objection that might be made.

From a defendant's standpoint, a court's *sua sponte* exclusion of a question unduly highlights it for the jury and may unfairly cast defense counsel in a bad light. If a trial judge feels he must take some action, a side-bar conference outside the hearing of the jury would be an alternate and preferable way to proceed. In addition, the right of a defendant to cross-examine and confront witnesses in a criminal case is key to a defendant being able to mount a defense. The court should not truncate this right on its own motion unless it is necessary to do so to avoid a serious miscarriage of justice.

We also express our disapproval of the manner in which the proffer was handled by the court and defense counsel. The proffer was wholly inadequate in that it only referenced generally that credibility was at issue and did not provide enough information as to specifically what would have been asked and the specific answers anticipated. Even if defense counsel had done this, however, the trial judge

would not have heard it since he was not present at the proffer. This is not an appropriate procedure. Although one purpose of a proffer is to protect the appellate record, a proper proffer also gives the court an opportunity to revisit its ruling.

Notwithstanding our criticism of what occurred, we nonetheless conclude that any error was harmless as a matter of law. In particular, the record shows that the jury had before it "'facts from which bias, prejudice or lack of credibility of a prosecution witness might be inferred.'" *Dorsey v. Parke*, 872 F.2d 163, 167 (6th Cir. 1989) (quoting *United States v. Garrett*, 542 F.2d 23, 25 (6th Cir. 1976)). Dosky's plea agreement was admitted into evidence as a government exhibit during direct examination of Dosky by the prosecution. During that examination, Dosky was asked specific questions relating to the terms of that agreement:

> Q In order for you to testify here today, you did something, did you not, relative to the processes of the court?
>
> A Yes.
>
> Q What did you do?
>
> A I pled guilty.
>
> Q To what?
>
> A One count of conspiracy.
>
> Q So you are convicted of a felony crime as you sit here today.

A Yes, I am.

Q You signed a plea agreement.

A Yes, I did.

MR. BROWN: May I approach this witness, your Honor?

THE COURT: Yes.

Q Did you sign only one plea agreement?

A Yes.

Q Is that the one plea agreement you signed? Check the last page.

A Yes, it is.

MR. BROWN: May I have a moment? I should have put an exhibit sticker on it. I will just call this Government's Exhibit 9.

Q Mr. Dosky, other than that plea agreement that you signed -- with advice of counsel, I take it; correct?

A Yes, sir.

Q -- do you have any other agreement with the United States?

A No, I don't.

THE COURT: You might ask him a question explaining to this jury what a plea agreement is, why it is entered into and what it provides for.

MR. BROWN: Thank you.

Q What did you agree to do in this plea agreement?

A I agreed to --

THE COURT: And who did you agree with?

THE WITNESS: I agreed with the United States to --

THE COURT: You mean the United States Attorney?

THE WITNESS: United States Attorney to offer my testimony truthfully and to explain my actions as it related to this investigation.

Q According to the plea agreement, does it say anything about what is going to happen to you if you don't tell the truth?

A Yes. I believe it states that the plea agreement will be null and void.

Q Doesn't it also say that you will be charged with perjury or making a false statement?

A I believe that it does, yes.

Q But otherwise, I think its [penultimate] paragraph of that document, second to last paragraph of that document, I think it indicates that if you provide truthful testimony, we will inform the Court of that; correct?

A Yes, it does.

Q So you haven't been sentenced yet.

A No, I have not.

Q You are going to appear before a judge in this building to be sentenced at some future time; correct?

A Yes, I will.

Q And you expect that we will report -- this office, the United States Attorney's Office, will report to the Court about what it is you have done and what you haven't done to faithfully observe this plea agreement, which is Government's Exhibit 9, prior to sentencing; correct?

Defendant insists that harmless error has not been shown under the "five *Van Arsdall* factors." He argues that the error was not harmless because Dosky was an important witness, his testimony was not cumulative, certain aspects of the testimony were not corroborated, no cross-examination was permitted on his motivation in testifying, and the prosecution's case, without Dosky, was weak.

Defendant's argument is unavailing. The factors listed in *Van Arsdall* were not exclusive. Rather, the Court recognized that a harmless-error analysis "in a particular case depends upon a host of factors, all readily accessible to reviewing courts." 475 U.S. at 684. Therefore, we conclude that the presence of facts in the record sufficient to permit a reasonable juror to infer bias on the part of Dosky rendered any error by the district court in limiting

impeachment for bias harmless beyond a reasonable doubt.[2]

Finally, we note that defense counsel had any number of ways available to further pursue the question ruled objectionable. It is more probable than not that the trial judge was voicing an objection only as to the *form* of the question. There is nothing from which even an inference can be drawn to suggest the trial judge was prohibiting defense counsel from exploring the general area of this witness' credibility and possible bias.

B. Judicial Commentary

In his second issue on appeal, Stavroff challenges the district court's comment that Dosky's motivation for testifying did not relate to defendant's "guilt or innocence." That comment, he claims, deprived him of his Sixth Amendment right to an impartial jury by "confirm[ing] the witness' credibility, thus encroaching upon the jury's province to determine truthfulness."

We disagree with defendant's characterization of what occurred. At most, the trial judge, *sua sponte*, ruled in front of the jury that as a matter of law the defense's line of questioning was irrelevant. He in no way gave any

---

[2]We also note that Dosky's testimony, while essential to the conspiracy charge, was not necessary for the underreported income charges. Stavroff received concurrent, indentical sentences on all of these charges.

indication as to his opinion of Dosky's credibility. To the extent the court's comment could be inferred by the jury as an instruction to disregard any improper motivation by Dosky, we review whether, considering the charge to the jury as a whole, the court fairly and accurately submitted the issues and the applicable law to the jury. *Miller v. Taylor*, 877 F.2d 469, 471 (6th Cir. 1989). An erroneous or ambiguous statement will not be cause for reversal unless it is likely that this improper statement, in the context of the entire charge, misled the jury. *Hurt v. Coyne Cylinder Co.*, 956 F.2d 1319, 1324 (6th Cir. 1992).

A review of the court's instructions in their entirety shows that notwithstanding the court's comments, the jury was not misled. In instructing the jury at the conclusion of the evidence, the court expressly referenced the exhibits that had been admitted into evidence, which included Dosky's plea agreement, as relevant for consideration in reaching a verdict. The court alluded to the instructions to the jury pertaining to the "credibility of witnesses," including "impeachment." The district judge elaborated on the instruction pertaining to witnesses who have pleaded guilty, stating:

> You have heard testimony from Steve Dosky. This witness pleaded guilty to crimes arising out of the same occurrence for which the defendant is now on trial. *You may consider evidence of a witness's guilty*

> *plea as it relates to the credibility of that witness.* You may not, however, consider the guilty plea of any person as evidence of guilt on the part of the defendant in this case.

(Emphasis added). The court specifically addressed the potential bias inherent in Dosky's plea agreement:

> You have also heard that the government has promised Mr. Dosky that it would inform his sentencing court of his cooperation in this case.
>
> It is permissible for the government to make such a promise, but you should consider Mr. Dosky's testimony with more caution than the testimony of other witnesses. Consider whether his testimony may have been influenced by the government's promise.

C. Business Records

Lastly, Stavroff takes issue with the district court's admission under the hearsay exception for business records, Fed. R. Evid. 803(6), of the 1992 and 1993 financial ledgers for the Gables Lounge. Rule 803(6) provides as follows:

> **Records of regularly conducted activity.** A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses,

made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

This circuit has held that a document is admissible under the rule if it satisfies the following four requirements:

> (1) it must have been kept in . . . a regularly conducted business activity; (2) it must have been kept in the regular course of that business; (3) the regular practice of that business must have been to have made the memorandum; and (4) the memorandum must have been made by a person with knowledge of the transaction or from information transmitted by a person with knowledge.

Bondie v. Bic Corp., 947 F.2d 1531, 1534 (6th Cir. 1991).

Defendant argues that the rule does not apply, however, because the source of the information contained

in these ledgers and the method or circumstances of preparation lack trustworthiness. The record does not identify the author of each of the entries contained in the ledgers. Defendant further refers to the testimony by one of the declarants, David Van Meter, that he "was not accountable" for his entries.

Neither of these charges has merit. A declarant does not have to be the source of the information recorded in business records. *Bondie*, 947 F.2d at 1534. Rather, the witness' lack of personal knowledge goes to the credibility that should be accorded that witness' testimony. *United States v. Sachs*, 801 F.2d 839, 843 (6th Cir. 1986). The Gables Lounge ledgers were introduced into evidence through the custodians of those records, the club's managers. The information contained in the ledgers recorded the cash register receipts at the end of each work shift. A substantial number of the entries had been recorded by the managers themselves from the cash register's ticket tapes. Nor is there any evidence that these figures were not accurately recorded. Notwithstanding Van Meter's comments regarding accountability, on further questioning by the judge, he admitted that his entries "matched the cash register receipts." Indeed, it was the manager's job to see that the receipts were entered into the ledgers. Under these circumstances, we conclude a proper foundation was established for the admissibility of the ledgers. The jury remained free to assign whatever weight

it found appropriate to the evidence. Moreover, we note that these ledgers were not the ledgers underlying defendant's charge of conspiracy to commit tax fraud. Those ledgers, which defendant does not challenge, related to the Spinners nightclub and were introduced into evidence through Dosky.

AFFIRMED.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER GRANTING RELEASE

Sixth Circuit Case №. 98-3126
Filed June 3, 1997

No. 97-3126

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*		6th Circuit Court of Appeals Filed 6/3/97
v.	)	**ORDER**
FRANK STAVROFF, *Defendant-Appellant.*	)	

Before: MERRTTI, CONTIE, and SUHRHEINRICH, Circuit Judges

The defendant appeals his conviction and sentence on one count of conspiracy to defraud the United States and three counts of tax fraud. He now moves for release on bail pending disposition of his appeal. The government opposes the motion.

To establish entitlement to release pending appeal, a person found guilty of an offense and sentenced to a term of imprisonment must show 1) by clear and convincing evidence, that he is not likely to flee or pose a danger to the safety of another person or the community, and 2) that the appeal is not for delay and raises a substantial question of law or fact likely to result in reversal, and order for new trial, a sentence that does not include a term of imprisonment, or a sentence reduced to a term of

imprisonment less than the total of the time already served plus the expected duration of the appeal process. 18 U.S.C. § 3143(b); *United States v. Pollard*, 778 F.2d 1177, 1181 (6th Cir. 1985). This statute creates a presumption against release pending appeal. *United States v. Vance*, 851 F.2d 166, 168-69 (6th Cir.), *cert. denied,* 488 U.S. 893 (1988).

The district court has found that the defendant does not present a flight risk or a danger to the community. Therefore, the sole issue to be determined is whether the defendant has raised a substantial question on appeal for purposes of release under § 3143(b). A substantial question is raised when the appeal presents a close question or one that could go either way. *United States v. Pollard*, 778 F.2d at 1182. Upon consideration, we conclude that the question of whether the district court erred in restricting defense counsel's cross-examination of a government witness is substantial for purposes of granting release.

It is **ORDERED** that the defendant's motion for release on bail pending appeal is granted, subject to such reasonable terms and conditions as the district court may fix in its discretion. The district court is requested to set these terms and conditions forthwith.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green

Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS
SOUTHERN DISTRICT OF OHIO

ORDER DENYING MOTION TO
RECONSIDER STAY PENDING APPEAL

Filed April 16, 1997

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

Southern Dist.
of Ohio
Filed 4/16/97

v. Case No. CR-2-96-97(003)

FRANK STAVROFF,
Defendant.

ORDER

This motion is before the Court on Defendant Frank Stavroff's ("Stavroff") motion for reconsideration of this Court's Order denying Stavroff' motion to stay his sentence pending appeal. The Court **DENIES** Stavroff's motion for reconsideration.

A defendant bears the burden of proving that he or she is entitled to release pending appeal. To satisfy that burden, a defendant must show by clear and convincing evidence (1) that he or she is not likely to flee or pose a danger to the safety of another person or the community, and (2) "that the appeal is not for the purposes of delay and raises a substantial question of law or fact likely to result in reversal or an order for new trial.' 18 U.S.C. § 3143(b); United States v. Pollard, 778 F.2d 1177, 1182 (6th Cir. 1985). A defendant is not entitled to release unless the

appeal raises a substantial question likely to result in reversal of or an order for a new trial on all counts on which imprisonment is imposed. United States v. Perholtz, 836 F.2d 554, 557 (D.C. Cir. 1987) (citing United States v. Bilanzich, 771 F.2d 292, 298 n.6 (7th Cir. 1985)).

Stavroff was convicted by a Jury on one count of conspiring to defraud the United States and three counts of filing false tax returns. Stavroff is serving a term of imprisonment of sixteen months on all four counts. (See Doc. #62 p. 10.) In his current motion, Stavroff raises the issue of whether the Court improperly restricted defense counsel during his cross examination of the government's key witness, Steven Dosky.

The Court need not consider whether this issue constitutes 'a substantial a question of law or fact likely to result in a reversal or an order for a new trial' because even if this issue is a substantial question, it only relates to one of the three counts on which Stavroff is imprisoned. In an Opinion and Order dated October 17, 1996, the Court found that Stavroff's convictions for filing false tax returns were supported by sufficient evidence to deny Stavroff's motion for a judgment of acquittal; Dosky's testimony was unnecessary for those convictions. (See Doc. # 44, p. 4.) Moreover, after reviewing the sentencing guidelines applied in this case, the Court concludes that the outcome of Stavroff's appeal of the conspiracy count will not substantially affect the guideline range. Therefore, even if

Stavroff raises a substantial question with respect to Dosky's testimony, that question would relate only to the conspiracy count and would not entitle Stavroff to release while his appeal on the other counts is pending, assuming that Stavroff is appealing those counts.

Upon consideration and being duly advised, the Court **DENIES** Stavroff's motion for reconsideration.

IT IS SO ORDERED.

/s/ Joseph P. Kinneary
UNITED STATES DISTRICT JUDGE

APPENDIX B

UNITED STATES COURT OF APPEALS
SOUTHERN DISTRICT OF OHIO

ORDER DENYING MOTION TO
STAY SENTENCE PENDING APPEAL

Filed February 24, 1997

Pages B-4 thru B-6

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

Southern Dist.
of Ohio
Filed 2/24/97

v.

Case No. CR-2-96-97(003)

FRANK STAVROFF,
Defendant.

ORDER

This motion is before the Court on Defendant Frank Stavroff's ('Stavroff") motion to stay his sentence pending appeal. The Court **DENIES** Stavroff's motion.

A district Court's decision regarding the release of a defendant pending appeal is governed by the Bail Reform Act (~the Act"), 18 U.S.C. § 3143. In recognition of the basic principle that a conviction is presumed to be correct, Congress passed the Act with the purpose of reducing the number of convicted persona who remain at large while pursuing their appeals. United States v. Powell, 761 F.2d 1227, 1232 (8th Cir. 1985) (quotations omitted). Accordingly, the Act establishes a presumption against release pending appeal. United States v. Vance, 851 F.2d 166, 168 (6th Cir. 1988).

The Defendant bears the burden of proving that he or she is entitled to release pending appeal. To satisfy that burden, a defendant must show by clear and convincing evidence that (1) he or she is not likely to flee or pose a danger to the safety of another person or the community, and (2) that the appeal is not for delay and raises a substantial question of law or fact likely to result in reversal, an order for new trial, or a sentence that does not include a term for imprisonment. 18 U.S.C. § 3143(b): United Staten v. Pollard, 778 F.2d 1177, 1182 (6th Cir. 1985). "[A]n appeal raises a substantial question when the appeal presents a 'close question or one that could go either way' and that [*sic*] the question 'is so integral to the merits of the conviction that it is more probable than not that reversal or a new trial will occur if the question is decided in the defendant's favor.'' Pollard, 778 F.2d at 1182 (citation omitted). Stavroff fails to carry his burden to show that his appeal raises a substantial question.

In his motion for release, Stavroff provides a list of general issues he claims are substantial. (Doc #65 at p. 5.) Stavroff fails, however, to develop any of these issues. He makes no citations to the record to specifically identify the alleged errors. He cites no authority and makes no legal arguments that would indicate that these issues will present a close question or one that could go either way. While the Court finds that Stavroff is not likely to flee and does not pose a danger to any person or to the community, "the mere

identification of issues does not demonstrate that an appeal establishes a substantial question entitling the defendant to release pending appeal under the Bail Reform Act." United States v. Moore, 849 F.2d 1474, 1988 WL 63191 at *1 (6th Cir.) (citing United States v. Pollard, 778 F.2d 1177. 1182 (6th Cir. 1985)).

Upon consideration, and being duly advised, the Court hereby **DENIES** Stavroff's motion to stay his sentence pending his appeal.

IT IS SO ORDERED.

/s/ Joseph P. Kinneary

UNITED STATES DISTRICT JUDGE

APPENDIX B

UNITED STATES COURT OF APPEALS
SOUTHERN DISTRICT OF OHIO

JUDGMENT

Filed February 11, 1997

Pages B-7 thru B-20

UNITED STATES DISTRICT COURT
Southern District of Ohio

Southern Dist.
of Ohio
Filed 2/11/97

UNITED STATES OF AMERICA

JUDGMENT IN A CRIMINAL CASE

V. (For Offenses Committed on or After November 1, 1987)

FRANK STAVROFF Case Number CR-2-96-0097 (3)
J. Boyd Binning, Esq.
Defendant's Attorney

THE DEFENDANT:

_ pleaded guilty to counts ____ of the Information/Indictment.

_ pleaded nolo contendere to counts ____ of the Information/Indictment.

X was found guilty on counts one (1), two (2), five (5), and eight (8) of the Indictment after a plea of not guilty

Title & Section	Nature of Offense	Date of Offense Concluded	Numbers
18 USC §371	Conspiracy to defraud the United States	7/11/96	one
26 USC §7206(1)	Fraud and False Statements	4/13/92	two
26 USC 57206(1)	Fraud and False Statements	4/9/93	five
26 USC 57206(1)	Fraud and False Statements	4/12194	eight

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

_ The defendant has been found not guilty on counts ___ of the Information/Indictment, and is discharged as to such counts.

_ Counts ___ of the Information/Indictment is/are dismissed on the motion of the United States.

IT IS **FURTHER** ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

February 7, 1997
Date of Imposition of Sentence

/s/ Joseph P. Kinneary
Joseph P. Kinneary
United States District Judge

Feb 11, 1997
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of SIXTEEN (16) MONTHS.

_ The Court makes the following recommendations to the Bureau of Prisons:

_ The defendant is remanded to the custody of the United States Marshal.

x The defendant shall surrender to the United States Marshal for this district,
x at 12:00 p.m. on February 14, 1997.
_ as notified by the Marshal.

_ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons
_ before 2 p.m. on ____
_ as notified by the United States Marshal.
_ as notified by the Probation or Pretrial Service Office.

RETURN

I have executed this Judgment as follows:

_____

_____

_____

Defendant delivered on 3-3-97 to FPC Ashland at Ashland, KY, with certified copy of this Judgment.

R. Allen smith
United States Marshal
By /s/ David ?????
Deputy U.S. Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of TWO (2) YEARS.

The defendant shall report to the probation office in the district to which the defendant is release within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant submit to one drug test within fifteen (15) days of release from imprisonment and at least two (2) periodic drug tests thereafter, as directed by the probation officer.

__ The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse.

__ The defendant shall not possess a firearm as defined in 18 U.S.C. §921.

If this judgment imposes a fine or restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this Court (set forth below). The defendant shall also comply with the additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the Judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthful all inquiries by the probation officer and follow the instructions or the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) the defendant shall notify the probation officer 10 days prior to any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate

with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record of personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

Count	Assessment	Fine	Restitution
one	$50.00	$10,000.00	
two	$50.00		
five	$50.00		
eight	$50.00		

_ If applicable, restitution amount ordered pursuant to plea agreement . . . . . $_____

Totals:	$200.00	$10,000.00	$

FINE

The above fine includes costs of incarceration and/or supervision in the amount of $_____

The defendant shall pay interest on any fine of more than $2,500, unless the fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. §3612(f). All of the payment options on Sheet 5, Part B may be subject to penalties for default and delinquency pursuant to 18 U.S.C. §3612(g).

X The court has determined that the defendant does not have the ability to pay interest and it is ordered that:

X The interest requirement is waived.

_ The interest requirement is modified as follows:

RESTITUTION

_ The determination of restitution is deferred in case brought under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after 09/13/1994, until _____. An Amended Judgment in a Criminal Case will be entered after such determination.

_ The defendant shall make restitution to the following payees in the amounts listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportional payment unless specified otherwise in the priority order or percentage payment column below.

Name of Payee	Total Amount of Loss	Amount of Restitution Ordered	Priority Order or Percentage of Payment
Totals	$	$	

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994.

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

Payment of the total fine and other criminal monetary penalties shall be due as follows:

A _ in full immediately; or

B _ $200.00 immediately, balance due (in accordance with C,D, or E); or

C _ not later than _____; or

D _ in installments to commence _____ days after the date of this judgment. In the event the entire amount of criminal monetary penalties imposed is not paid prior to the commencement of supervision, the U.S. probation officer shall pursue collection of the amount due, and shall request the court to establish a payment schedule if appropriate; or

E X a payment of $3,500.00 shall be due three (3) months after the date of imposition of sentence. A payment of $3,500.00 shall be due six (6) months after the date of imposition of sentence. Finally a payment of $3,000.00 shall be due twelve (12) months after the date of imposition of sentence.

The National Fine Center will credit the defendant for all payments previously made toward any criminal monetary penalties imposed.

Special instruction regarding the payment of criminal monetary penalties:

_ The defendant shall pay the cost of prosecution.

_ The defendant shall forfeit the defendant's interest in the following property to the United States:

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalty payments are to be made to the United States Courts National Fine Center, Administrative Office of the United States courts, Washington, DC 20544, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program,. If the National Fine Center is not operating in this district, all criminal monetary penalty payments are to be made as directed by the court, the probation officer, or the United States attorney.

STATEMENT OF REASONS

_x_ The court adopts the factual finding and guideline application in the presentence report.

OR

_ The court adopts the factual findings and guideline application in the presentence report except:

Guideline Range Determined by the Court:

Total Offense Level: 12

Criminal History Category: I

Imprisonment Range: 10 to 16 months

Supervised Release Range: 2 to 3 years

Fine Range: $ 3,000.00 to $ 30,000.00

_ Fine waived or below the guideline range because of inability to pay.

Total Amount of Restitution: $ -0-

_ Restitution is not ordered because the complication and prolongation of the sentencing process resulting from the fashioning of a restitution order outweighs the need to provide restitution to any victims, pursuant to 18 U.S.C. §3663(d).

_ For offenses that require the total amount of loss to be stated, pursuant to Chapters 109A, 110, 110A, and

113A of Title 18, restitution is not ordered because the economic circumstance of the defendant do not allow for the payment of any amount of a restitution order, and do not allow for the payment of any or some portion of a restitution order in the foreseeable future under any reasonable schedule of payments.

_ Partial restitution is ordered for the following reasons:

_X_ The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

OR

_ The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reasons:

OR

_ The sentence departs from the guideline range

_ upon motion of the government, as a result of defendant's substantial assistance, the Court departs to a level ___.

_ for the following reasons:

APPENDIX B

UNITED STATES COURT OF APPEALS
SOUTHERN DISTRICT OF OHIO

MEMORANDUM OPINION AND ORDER

Filed October 17, 1996

Pages B-21 thru B-26

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

Southern Dist.
of Ohio
Filed 10/17/96

v. Case No. CR-96-97(3)

FRANK STAVROFF,
Defendant.

MEMORANDUM OPINION AND ORDER

This matter is before the Court on Defendant Frank Stavroff's ("Stavroff") motion in limine, motion for a judgement of acquittal, and the Court's own motion to clarify the record. As the Court announced at trial, the Court **DENIES** both of the defendant's motions.

I. Background

In this case, the Government charged Stavroff with conspiring to defraud the United States and with filing false tax returns. At trial, the following matters arose.

II. Motion in Limine

Stavroff filed a motion in limine at trial. The court **DENIED** Stavroff's motion during the trial. The Court now states for the record the basis for its decision in fuller detail.

Stavroff seeks to suppress two calendars seized from the business offices of Gables Lounge during a raid by

Internal Revenue Service agents. In his motion in limine, Stavroff argues that the statements in the calendars are inadmissible hearsay, not coconspirator's statements, and that they should be excluded from evidence. See Fed. R. Evid. Rule 801(D)(2)(E). The government contends that the calendars are a daily record of the actual gross receipts of the lounge. The government's theory of admissibility, as expressed at trial, is that these records come within the "business records" exception to the hearsay rule. Fed. R. Evid. Rule 803(6). The Court agrees with the government.

Even if Stavroff is correct that the calendars are not coconspirator's statements, and they fit the definition of hearsay, the calendars are admissible if they fall within an exception to the hearsay rule. See Fed. R. Evid. Rule 801 and Rule 803. One exception to the hearsay rule is for "records of regularly conducted activity" or "business records." Fed. R. Evid. Rule 803(6). The Sixth Circuit has defined the proper foundation for a business record as follows:

> [F]or a business record to be admissible under Rule 803(6), Federal Rules of Evidence, the record must satisfy four requirements: (1) it must have been made in the course of a regularly conducted business activity; (2) it must have been kept in the regular course of that business; (3) the regular practice of that business must have been to have made the memorandum; and (4) the memorandum must have

> been made by a person with knowledge of the transaction or from information transmitted by a person with knowledge.

Redken Laboratories Inc. v. Levin, 843 F.2d 226, 229 (6th Cir. 1988).

The testimony at trial established that the seized calendars are regularly kept business records within the scope of Federal Rule of Evidence 803(6). The calendars were identified by qualified witnesses -- namely, Lee Mayle and Dave Van Meter, the managers of the nightclub, who were the persons who maintained the records contained in the calendars. Mayle and Van Meter were both available for cross—examination. The managers had knowledge of the nightclub's business receipts because they personally added them. The managers also, as a regular practice, wrote the amount of total receipts into the calendar each day. The testimony further established -- and the entries into the calendar confirm -- that the records were maintained in a consistent form and with a consistent purpose. Finally, and most importantly, the calendars are likely to be reliable because they were the only record of the actual gross receipts of the nightclub; the owners of the nightclub had to rely on them if they wanted to know the income of their business. The calendars, though perhaps unorthodox in form, are admissible as regularly kept business records. See United States v. McPartlin, 595 F.2d 1321 (7th Cir. 1979).

III. Motion for Judgement of Acquittal

At the close of the government's evidence, Stavroff moved for a Judgement of Acquittal pursuant to Rule 29(a) of the Federal Rules of Criminal Procedure. The Court reserved its decision on Stavroff's motion. Fed. R. Crim. P. Rule 29(b). The Court now **DENIES** Stavroff's motion.

In a criminal case, a court shall enter a judgment of acquittal of one or more offenses charged in the indictment "if the evidence is insufficient to sustain a conviction of such offense or offenses." Fed. R. Crim. P. Rule 29(a). In making its determination, the Court must view the evidence presented in a light most favorable to the government. The government's evidence is insufficient only if it fails to support one or more of the elements of the offense charged. United States v. Adamo, 742 F.2d 927, 934—35 (6th Cir. 198). After listening to the evidence, the Court is convinced that the government presented both documentary and testimonial evidence supporting each element of the offenses charged.

With respect to the conspiracy charge, the government offered the testimony of Steve Dosky, among others, supported by substantial documentary evidence that tended to show (1) that there was an agreement between Stavroff and his business partners to defraud the government by underreporting both income and employees of the nightclubs they owned, (2) that Stavroff knew of the agreement's illegal purpose and willingly joined in the

agreement to further that purpose, and (3) that members of conspiracy performed overt acts in furtherance of the conspiracy.

With respect to the charges that Stavroff filed false tax returns, the main evidence the government introduced (1) Stavroff's signed tax returns for the relevant years; (2) the testimony of Mr. Jim Wiggins, a bookkeeper who interviewed Stavroff for his tax information; and (3), the testimony of an expert. This evidence tended to show (1) that Stavroff had knowledge of his duty to pay taxes, (2) that Stavroff underreported his income on the tax returns in question, and (3) that Stavroff had knowledge that the income reported on his personal tax returns was false.

Therefore, the government presented sufficient evidence to support a conviction of the offenses charged in the indictment. Upon consideration and being duly advised, the Court **DENIES** Stavroff's motion for a judgment of acquittal.

IV. The Indictment

The Court now moves to clarify the record. Two of the three defendants in this case entered into plea agreements before trial. Thereafter, for the sole purpose of instructing the jury, to avoid unfair prejudice or confusion and with no objections from either party, the Court renumbered the Counts in the jury instructions and on the jury verdict form as follows: Count Five of the indictment was renumbered as Count Three, and Count Eight of the

indictment was renumbered to Count Four. The Counts of the indictment that were directed only at defendant Stavroff's codefendants were not submitted to the jury; in addition, the names of Stavroff's codefendants were redacted from Count One.

After instruction on the four remaining counts, the jury returned a guilty verdict on Counts One, Two and the renumbered Counts Three and Four -- which were the original Counts Five and Eight in the Indictment. Thus, it should be clear that Stavroff was found guilty of Counts One, Two, Five and Eight of the original indictment.

IT IS SO ORDERED.

/s/ Joseph P. Kinneary
UNITED STATES DISTRICT JUDGE

APPENDIX B

UNITED STATES COURT OF APPEALS
SOUTHERN DISTRICT OF OHIO

ORDER

Filed June 4, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

vs.

Criminal Action 2:96-CR-97
Judge Kinneary
Magistrate Judge King

FRANK STAVROFF,
Defendant.

ORDER

Southern Dist.
of Ohio
Filed 6/4/97

In an Order entered June 3, 1997, the United States Court of Appeals for the Sixth Circuit granted defendant Stavroff's motion for release on bail pending appeal "subject to such reasonable terms and conditions as the district court may fix in its discretion." Order No. 97-3126 (June 3, 1997).

Defendant Frank Stavroff is ORDERED RELEASED, pending appeal, on the terms and conditions previously imposed, i.e., upon his promise to appear at all proceedings as required and to surrender for service of any sentence imposed as directed. Moreover, the Court notes that defendant Stavroff's passport remains in the custody or the Office of the Clerk of this Court.

The Bureau of Prisons shall forthwith release defendant Stavroff pursuant to this order.

/s/ Norah McCann King
Norah McCann King
United States Magistrate Judge

APPENDIX C

STATUES AND RULES

Pages C-1 thru C-12

18 U.S.C. § 371. Conspiracy to Commit Offense or to Defraud United States.

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

26 U.S.C. § 7206. Fraud and False Statements.

Any person who--

(1) **Declaration under penalties of perjury.** Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; or

(2) **Aid or assistance.** Willfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a return, affidavit, claim, or other document, which is fraudulent or is false as to any material matter, whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document; or

(3) **Fraudulent bonds, permits, and entries.** Simulates or falsely or fraudulently executes or signs any bond, permit, entry, or other document required by the provisions of the internal revenue

laws, or by any regulation made in pursuance thereof, or procures the same to be falsely or fraudulently executed, or advises, aids in, or connives at such execution thereof; or

(4) **Removal or concealment with intent to defraud.** Removes, deposits, or conceals, or is concerned in removing, depositing, or concealing, any goods or commodities for or in respect whereof any tax is or shall be imposed, or any property upon which levy is authorized by section 6331, with intent to evade or defeat the assessment or collection of any tax imposed by this title; or

(5) **Compromises and closing agreements.** In connection with any compromise under section 7122, or offer of such compromise, or in connection with any closing agreement under section 7121, or offer to enter into any such agreement, willfully--

(A) **Concealment of property.** Conceals from any officer or employee of the United States any property belonging to the estate of a taxpayer or other person liable in respect of the tax, or

(B) **Withholding, falsifying, and destroying records.** Receives, withholds, destroys, mutilates, or falsifies any book, document, or record, or makes any false statement, relating to the estate or financial condition of the taxpayer or other person liable in respect of the tax;

shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $ 100,000 ($ 500,000 in the case of a corporation), or imprisoned not more than 3 years, or both, together with the costs of prosecution.

Fed. Evid. R. 608. Evidence of Character and Conduct of Witness

(a) **Opinion and reputation evidence of character.** The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

(b) **Specific instances of conduct.** Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified. The giving of testimony, whether by an accused or by any other

witness, does not operate as a waiver of the accused's or the witness' privilege against self-incrimination when examined with respect to matters which relate only to credibility.

Notes of Advisory Committee. Fed. Evid. R. 608.

Subdivision (a). In Rule 404(a) the general position is taken that character evidence is not admissible for the purpose of proving that the person acted in conformity therewith, subject, however, to several exceptions, one of which is character evidence of a witness as bearing upon his credibility. The present rule develops that exception.

In accordance with the bulk of judicial authority, the inquiry is strictly limited to character for veracity, rather than allowing evidence as to character generally. The result is to sharpen relevancy, to reduce surprise, waste of time, and confusion, and to make the lot of the witness somewhat less unattractive. McCormick Section 44. The use of opinion and reputation evidence as means of proving the character of witnesses is consistent with Rule 405(a). While the modern practice has purported to exclude opinion witnesses who testify to reputation seem in fact often to be giving their opinions, disguised somewhat misleadingly as reputation. See McCormick Section 44. And even under the modern practice, a common relaxation has allowed inquiry as to whether the witnesses would believe the principal witness under oath. United States v. Walker, 313 F.2d 236 (6th Cir. 1963), and cases cited therein; McCormick @ 44, pp. 94-95, n. 3.

Character evidence in support of credibility is admissible under the rule only after the witness' character has first been attacked, as has been the case at common law. Maguire, Weinstein, et al., Cases on Evidence 295 (5th ed. 1965); McCormick Section 49, p. 105; 4 Wigmore Section 1104. The enormous needless consumption of time which a contrary practice would entail justifies the limitation. Opinion or reputation that the witness is untruthful specifically qualifies as an attack under the rule, and evidence or misconduct, including conviction of crime, and of corruption also fall within this category. Evidence of bias or interest does not. McCormick Section 49; 4 Wigmore Sections 1106, 1107. Whether evidence in the form of contradiction is an attack upon the character of the witness must depend on the circumstances. McCormick Section 49. Cf. Wigmore Sections 1108, 1109.

As to the use of specific instances on direct by an opinion witness, see the Advisory Committee's Note to Rule 405, supra.

Subdivision (b). In conformity with Rule 405, which forecloses use of evidence of specific incidents as proof in chief of character unless character is an issue in the case, the present rule generally bars evidence of specific instances of conduct of a witness for the purpose of attacking or supporting his credibility. There are, however,

two exceptions: (1) specific instances are provable when they have been the subject of criminal conviction, and (2) specific instances may be inquired into on cross-examination of the principal witness or of a witness giving an opinion of his character for truthfulness.

(1) Conviction of crime as a technique of impeachment is treated in detail in Rule 609, and here is merely recognized as an exception to the general rule excluding evidence of specific incidents for impeachment purposes.

(2) Particular instances of conduct, though not the subject of criminal conviction, may be inquired into on cross-examination of the principal witness himself or of a witness who testifies concerning his character for truthfulness. Effective cross-examination demands that some allowance be made for going into matters of this kind, but the possibilities of abuse are substantial. Consequently safeguards are erected in the form of specific requirements that the instances inquired into be probative of truthfulness or its opposite and not remote in time. Also, the overriding protection of Rule 403 requires that probative value not be outweighed by danger of unfair prejudice, confusion of issues, or misleading the jury, and that of Rule 611 bars harassment and undue embarrassment.

The final sentence constitutes a rejection of the doctrine of such cases as People v. Sorge, 301 N.Y. 198, 93 N.E.2d 637 (1950), that any past criminal act relevant to credibility may be inquired into on cross-examination, in apparent disregard of the privilege against self-incrimination. While it is clear that an ordinary witness cannot make a partial disclosure of incriminating matter and then invoke the privilege on cross-examination, no tenable contention can be made that merely by testifying he waives his right to foreclose inquiry on cross-examination into criminal activities for the purpose of attacking his credibility. So to hold would reduce the privilege to a nullity. While it is true that an accused, unlike an ordinary witness, has an option whether to testify, if the option can be exercised only at the price of opening up inquiry as to any and all criminal acts committed during his lifetime, the right to testify could scarcely be said to possess much vitality. In Griffin v. California, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965), the Court held that allowing comment on the election of an accused not to testify exacted a constitutionally impermissible price, and so here. While no specific provision in terms confers constitutional status on the right of an accused to take the stand in his own defense, the existence of the right is so completely recognized that a denial of it or substantial infringement upon it would surely be of due process dimensions. See Ferguson v. Georgia, 365 U.S. 570, 81 S.Ct. 756, 5 L.Ed.2d

783 (1961); McCormick Section 131; 8 Wigmore Section 2276 (McNaughton Rev. 1961). In any event, wholly aside from constitutional considerations, the provision represents a sound policy.

Notes of Committee on the Judiciary, House Report No. 93-650. Rule 608(a) as submitted by the Court permitted attack to be made upon the character for truthfulness or untruthfulness of a witness either by reputation or opinion testimony. For the same reasons underlying its decision to eliminate the admissibility of opinion testimony in Rule 405(a), the Committee amended Rule 608(a) to delete the reference to opinion testimony.

The second sentence of Rule 608(b) as submitted by the Court permitted specific instances of misconduct of a witness to be inquired into on cross-examination for the purpose of attacking his credibility, if probative of truthfulness or untruthfulness, "and not remote in time". Such cross-examination could be of the witness himself or of another witness who testifies as to "his" character for truthfulness or untruthfulness.

The Committee amended the Rule to emphasize the discretionary power of the court in permitting such testimony and deleted the reference to remoteness in time as being unnecessary and confusing (remoteness from time

of trial or remoteness from the incident involved?). As recast, the Committee amendment also makes clear the antecedent of "his" in the original Court proposal.

Notes of Conference Committee, House Report No. 93-1597. The Senate amendment adds the words "opinion or" to conform the first sentence of the rule with the remainder of the rule.

The Conference adopts the Senate amendment.

Notes of Advisory Committee on 1987 amendments. The amendments are technical. No substantive change is intended.

Notes of Advisory Committee on 1988 amendments. The amendment is technical. No substantive change is intended.

APPENDIX D

CONSTITUTIONAL PROVISION

Pages D-1 thru D-1

U.S. CONST. amend VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.